

In the Supreme Court of the United States

OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court,
Appellate Division, Second Department
of the State of New York

BRIEF OF *AMICI CURIAE* SOLID WASTE ASSOCIATION
OF NORTH AMERICA, BRISTOL RESOURCE RECOVERY
FACILITY OPERATING COMMITTEE (CONNECTICUT),
CONNECTICUT RESOURCES RECOVERY AUTHORITY,
ISLIP RESOURCE RECOVERY AGENCY (NEW YORK),
LANCASTER COUNTY SOLID WASTE MANAGEMENT
AUTHORITY (PENNSYLVANIA), MONTEREY
REGIONAL WASTE MANAGEMENT DISTRICT
(CALIFORNIA), COUNTY SANITATION DISTRICTS
OF LOS ANGELES COUNTY (CALIFORNIA), SOLID
WASTE AUTHORITY OF CENTRAL OHIO, SOLID
WASTE AUTHORITY OF PALM BEACH COUNTY
(FLORIDA), SOUTHEAST ALABAMA SOLID WASTE
DISPOSAL AUTHORITY, SOUTHEASTERN PUBLIC
SERVICE AUTHORITY OF VIRGINIA, SPOKANE
REGIONAL SOLID WASTE DISPOSAL PROJECT
(WASHINGTON) IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The Solid Waste Association of North America ("SWANA") is a nonprofit educational organization serving individuals and communities that manage and operate municipal solid waste management systems. Dedicated to the advancement of professionalism in the field, SWANA offers its members a variety of training programs, technical assistance and educational opportunities to meet their ever-growing needs. Founded in the 1960s as the Governmental Refuse Collection and Disposal Association, SWANA has become the largest member-based solid waste management association in the world. The overwhelming majority of SWANA members are municipal, county and regional public officials who are responsible for managing municipal solid waste systems that are government-owned or government-sponsored.¹ Other SWANA members include private sector companies and firms that provide systems, equipment, and consulting services in the field of solid waste management.

The other *amici* joining in this brief are municipal and regional public agencies and special authorities who are responsible for the day-to-day management of a growing and diverse solid waste stream.

The Bristol Resource Recovery Facility Operating Committee includes the cities of New Britain and Bristol and the towns of Plainville, Burlington, Southington, Plymouth, Branford, Hartland, Prospect, Warren, Washington, Wolcott, Berlin and Seymour who are represented by their respective mayors, first selectpersons or town managers on the Committee. These local governments are parties to a service agreement with a privately owned waste-to-energy facility owner-operator.

¹ Municipal solid waste management "is primarily a local responsibility" and few, if any, responsibilities are more integral to local government. See U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* (1988).

The Connecticut Resources Recovery Authority ("CRRA") consists of some 113 cities and towns that participate in CRRA's four waste-to-energy projects. CRRA owns and operates recycling facilities, landfills and transfer stations.

The Islip Resource Recovery Agency includes the Town of Islip and the following villages: Islandia, Brightwaters, Saltaire and Ocean Beach. The Agency owns an incinerator, and owns and operates composting and recycling facilities, as well as landfills.

The Lancaster County Solid Waste Management Authority serves 60 municipalities within the county and all remaining portions of the county. The Authority owns an incinerator and recycling facilities, and owns and operates landfills, transfer stations, and household hazardous waste management facilities.

The Monterey Regional Waste Management District includes the cities of Carmel, Del Ray Oaks, Marina, Monterey, Pacific Grove, Sand City and the following areas: Big Sur, Carmel Highlands, Pebble Beach, Carmel Valley, Castroville, Corral del Tierra, Laguna Seca, Moss Landing, San Benancio, and Toro Park. The District's primary function is to dispose of solid waste in the Monterey Peninsula area. The District's role has recently expanded to include the recovery of recyclable materials in the wastestream, including cardboard, newspaper, glass, woodwaste, plastics, metals, concrete, asphalt, reusable building materials and resale items. The District also receives some of Monterey County's non-hazardous liquid wastes. The first landfill-gas-to-electrical-energy system in Central California was installed at the disposal site in 1983. More than 1,200 kw of continuous power are currently being generated.

The County Sanitation Districts of Los Angeles County are a confederation of 27 special districts, each having its own board of directors consisting of the presiding

officers of the local jurisdictions within the district. The districts include 79 cities and unincorporated areas. The districts own and operate recycling facilities, landfills and transfer stations, and jointly own and operate (with other governmental agencies) refuse-to-energy facilities.

The Solid Waste Authority of Central Ohio includes the following municipalities, townships and other political subdivisions: City of Bexley; Village of Brice; Village of Canal Winchester; City of Columbus; City of Dublin; City of Gahanna; City of Grandview Heights; City of Grove City; Village of Groveport; Village of Harrisburg; City of Hilliard; Village of Lockbourne; Village of Marble Cliff; Village of Minerva Park; Village of New Albany; Village of Obetz; City of Reynoldsburg; Village of Riverlea; City of Upper Arlington; Village of Urbancrest; Village of Valleyview; City of Westerville; City of Whitehall; City of Worthington; Blendon Township; Brown Township; Clinton Township; Franklin Township; Hamilton Township; Jackson Township; Jefferson Township; Madison Township; Mifflin Township; Norwich Township; Perry Township; Plain Township; Pleasant Township; Prairie Township; Sharon Township; Truro Township; and Washington Township. The Authority owns composting, tire processing and general recycling facilities, operates an incinerator, transfer station and household hazardous waste program, and owns and operates landfills.

The Solid Waste Authority of Palm Beach County serves all incorporated and unincorporated areas of the county. The Authority owns composting and recycling facilities, landfills, transfer stations and incinerators.

The Southeast Alabama Solid Waste Disposal Authority includes the counties of Dale, Geneva, Henry, and Houston, and all municipalities therein except for the city of Dothan. Its managing board is appointed by the governing bodies of the participating political subdivisions.

The Authority owns and operates a landfill and transfer stations.

The Southeastern Public Service Authority of Virginia consists of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach, and the counties of Isle of Wight and Southhampton. The Authority owns and operates incinerators, composting and recycling facilities, tire shredders, a ferrous metal plant, a refuse-derived-fuel plant, landfills and eight transfer stations.

The Spokane Regional Solid Waste Disposal Project serves Spokane County and all incorporated areas therein. The Project owns an incinerator and a compost facility, and owns and operates recycling facilities, landfills, transfer stations and a household hazardous waste collection program.

These governmental *amici* meet their respective solid waste management obligations by promoting and utilizing sound and prudent practices to further public health, environmental sensitivity and economic stability. EPA encourages local communities to employ an "integrated waste management" approach to solid waste planning using a combination of four alternatives—source reduction (*i.e.*, reducing the amount of waste generated), recycling, waste combustion with energy recovery, and landfilling. U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* (1988), p. 2. EPA recognizes that every community must "custom-design" its integrated waste management system in order to meet local environmental, economic and institutional needs. *Id.* at 16.

For the *amici*, flow control is a rational, nondiscriminatory mechanism for the interactive and complementary use of these waste management methods as part of an environmentally sound strategy for municipal solid waste management.

SUMMARY OF ARGUMENT

While Congress and state legislatures have respectively set national and state solid waste management policy, the combined effect of the resulting laws places the burden of implementation squarely on local governments and solid waste special service authorities.

Consistent with national and state goals, these local jurisdictions and agencies are entitled to shape programs and strategies for efficient and environmentally sound methods—and combinations of methods—to manage municipal solid waste. Local governments and solid waste management authorities are spending sizable sums of money trying to deal with the management of municipal solid waste. In response to changing federal and state mandates and increasingly strong public support, local government units are turning to management strategies that integrate a mix of solutions: promoting waste reduction; recycling and composting; recovering energy from waste; and landfilling.

Local government's historic obligation to protect public health and safety has taken on a new dimension and meaning in the late 20th Century: protection of the environment. Indeed, courts from Connecticut to California are ruling that local governments are legally liable, and thus financially responsible, for any adverse consequences of municipal solid waste management—regardless of fault or what other parties may have done.

Hence, local municipal solid waste managers must have authority commensurate with their responsibilities. If local government is obliged to plan and implement sophisticated and responsive integrated municipal solid waste management systems, then local officials must have an assortment of tools and instruments from which to choose in shaping appropriate components and features of such systems.

Flow control—directing or regulating the movement, processing and disposition of locally generated or locally

processed solid waste materials—is a rational, responsible and realistic mechanism to implement comprehensive integrated municipal solid waste management policy.

Flow control does not necessarily displace or otherwise threaten private solid waste management service contractors. It merely assures that they will achieve success by advancing the public interest. Flow control enables local government to deal with as many pieces of the municipal solid waste management puzzle as possible—simultaneously, openly, harmoniously, responsibly.

ARGUMENT

I. MANDATORY DISPOSAL OF LOCALLY GENERATED SOLID WASTES AND RECYCLING RESIDUES AT GOVERNMENT-SPONSORED FACILITIES SERVES AND EFFECTUATES LEGITIMATE LOCAL INTERESTS.

A. Local Governments Have an Obligation To Protect Public Health and the Environment.

Local government management of municipal solid waste (or local government supervision of private performance of this activity) is a valid exercise of the police power. *See, e.g., California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905); *Central Iowa Refuse Systems, Inc. v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983) *cert. denied*, 471 U.S. 1003 (1985) (“Construction of solid waste disposal facilities is an essential government activity”). Indeed,

control of local sanitation, including garbage collection and disposal, . . . is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment.

Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187, 1192 (6th Cir. 1981), *vacated and remanded on*

other grounds, 455 U.S. 931 (1982), *aff'd on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). Moreover, supervision of the removal and disposal of municipal solid waste is not only lawful but an affirmative duty properly delegated to and imposed on local government. *McQuillin Mun Corp* § 24.242 (3rd Ed).

Local authorities may supervise or directly perform the management of municipal solid waste generated within or imported into their service areas. Indeed, a municipal corporation can contract with one or more individuals or firms for the collection and removal of solid wastes, and it may grant an exclusive contract for such services, regulating the manner and mode of the contractor's operation. *Id.* at §§ 24.255, 24.248, 24.251.

B. Flow Control Protects Public Health and the Environment and Preserves Resources.

Flow control permits local authorities to assure that wastes, recyclables, compostables and other elements of the jurisdiction's solid waste stream will be processed or handled in an environmentally responsible manner.

Flow control of waste, when part of a properly designed and fully integrated solid waste management system, enables various segments of the municipal solid waste stream to reach the proper facility for processing, treatment or disposal. Reliable collection, processing and treatment systems improve the safety and public health benefits of such systems. For example, flow control facilitates compliance with federally-required random inspections for hazardous materials in incoming loads at landfills. *See* 40 C.F.R. § 258.20. In a fully integrated system, all waste materials can be channeled through a single management point, thereby permitting the system to make the best decisions on how each segment of the solid waste stream should be managed—whether by recycling, composting, landfilling, or disposing at waste-to-

energy facilities. Unless materials can be directed to appropriate facilities, proper and cost-effective inspection, sorting and separating, and management of the waste stream cannot be accomplished.

Local governments and agencies that operate waste-to-energy facilities must monitor the municipal solid waste stream to minimize the risk that incoming waste loads will contain toxic or explosive materials. By controlling the flow of waste from the generator, this can be accomplished.

Flow control permits local government to implement environmentally sound solid waste management goals. Allowing government to "enter into and meet long- and short-term contracts for final disposal, which are typically on a put-or-pay basis" is a legitimate nonprotectionist purpose. *J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 920 (3d Cir. 1988).

C. Flow Control Assures Oversight and Continuity of Management and Care for Systems and Facilities.

Flow control permits local authorities to set a tipping fee for a municipal solid waste management system that reflects the true cost of integrated municipal solid waste management, including its long-term environmental costs, and thus furthers the orderly and deliberate development and financial security of all municipal solid waste management facilities. Flow control is important, and defensible, where state or local government determines that a public facility is in the long-term best interests of its citizens (i) to assure stability or the continuous availability of solid waste management facilities that adequately address public health and environmental concerns, and (ii) to assure that such facilities are available at reasonable cost. The former concern simply reflects the significant public interest in having adequate, on-going and reliable municipal solid waste management services—no less important than

for safe drinking water, sewage treatment and police and fire protection.

Local government reasonably may determine that these services can best be assured and managed when local government itself undertakes the services. Availability and reliability of such services should not depend upon its profitability or the viability of private service providers alone. When local governments and solid waste authorities provide management facilities for locally generated solid wastes, they are not seeking profits. Their job is to implement carefully considered state, regional or local municipal solid waste plans and to place the financial burden equitably upon those whose needs are meant to be served.

Local governments and solid waste authorities have not been categorically exempted under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for their waste management activities. See 42 U.S.C. § 9601 (21). In particular, these governments and agencies may incur liability for transporting materials containing hazardous substances covered by CERCLA. Hazardous wastes may be present in loads that municipal garbage trucks may have picked up from local businesses or even from households. As a result, local authorities may be deemed "transporters" of hazardous wastes even where insignificant amounts of such substances were part of each load. See, e.g., *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992). Moreover, local governments are potentially liable under Superfund as "arrangers for disposal" of municipal solid waste even when such materials are collected and transported by private haulers. *Transportation Leasing Co. v. California*, No. CV-89-7368-WMB (GHKx) (C.D. Cal. July 21, 1992). The Court had earlier found that the governments can be said to have "owned or possessed" residential and commercial solid waste transported by contractors and government-licensed haulers. *Id.*, slip op. at 21-27 (C.D. Cal.

Sept. 24, 1991). If, as a matter of law, a public entity that simply oversees the process of local solid waste management (which may be performed entirely by the private sector) can be held fully liable under federal law for any adverse environmental consequences of the process, then such an entity is entitled to corresponding authority to control the process—from generation to final disposition.

II. THE TOWN'S FLOW CONTROL MEASURE IS EVENHANDED AND DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE EITHER DIRECTLY OR IN PURPOSE AND EFFECT.

In determining whether a governmental entity has overstepped its role in regulating interstate commerce, this Court has established a two-step inquiry. First, does the regulation overtly discriminate against interstate trade? *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Such regulations, deemed "basically protectionist measure[s]," are subject to a "virtual[] *per se* rule of invalidity. *Id.* at 624; see also *Hughes v. Oklahoma*, 441 U.S. 322 (1979). Second, if the restriction does not flatly discriminate against interstate trade, then the court will decide whether it regulates evenhandedly to effect a legitimate local public interest with only incidental effects on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The regulation will be upheld unless the burden imposed on commerce is clearly excessive in relation to putative local benefits.

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

A. Local Law 9 Is Not a Protectionist Measure That Burdens Out-of-State Economic Interests.

Key to the determination of protectionism versus non-protectionism is the extent of discrimination against out-of-state commerce. The ultimate purpose of the legislation under attack "may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, *apart from their origin*, to treat them differently." *Philadelphia v. New Jersey*, 437 U.S. at 626-627 (emphasis added). It follows, then, that the ultimate purpose of the Town law may not be accomplished by discriminating against out-of-state interests unless there is some reason, apart from their origin or location, to treat them differently. Where the ordinances regulate evenhandedly those in-state and out-of-state, then the *per se* rule does not apply and a balancing test must be applied. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-472 (1981).

The Town does not impose an economic burden on out-of-state interests. No out-of-state companies are deprived of the opportunity to do local solid waste handling. The only burden, which is shared locally and elsewhere, is the community's burden of adequate planning for the management of locally-generated waste.

Thus, local regulation of environmental protection must be distinguished from the line of cases considering mere economic regulation, *e.g.*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) and *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The Court itself recognized this distinction in *Pike* stating, "We are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation has long been recognized' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods." 397 U.S. at 143. See also *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 449 (1978) (Blackmun, J., concurring) ("[I]f safety justifications are not illusory, the Court will

not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." The *Pike* test is adequate to judge state and local solid waste regulation. *Pike* allows courts to adequately give deference to the historic and well-recognized state interests and express federal policy for state actions.

By comparison, the *Hughes* test is inappropriate for analyzing local solid waste regulation. *Hughes* requires a state or locality to demonstrate that it has chosen the best, the wisest, the most carefully crafted, least restrictive alternative available of all possible options that may occur to litigants or judges later, at their leisure. No higher or more inappropriate test for the constitutionality of a state action could be devised. The Court should not sit as a super-legislature to review the wisdom of state or local legislative decisions that flow from the core of state sovereign concerns such as environmental protection enactments.²

This Court should not construe Local Law 9 as a form of economic protectionism. The law is part of an overall solid waste management plan that makes allowances for recycling. Although the economic vitality of the Town's privately operated waste disposal facility is a concern, the facility's primary purpose is to manage solid waste consistent with Town needs and with state objectives.

The law assures that the designated facility will process the waste generated within the Town. The requirement that all "acceptable waste" generated within the Town be delivered to the Town's facility is a burden that

² "These safety measures carry a strong presumption of validity when challenged in Court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid State objective. Policy decisions are for the state legislature, absent federal entry into the field." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959). See also *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 190 (1937).

falls equally upon in-state and out-of-state businesses and facilities. The law is indifferent to the origin of the businesses or the location of other disposal or processing facilities.

B. Pervasive and Historic State and Local Regulation of Solid Waste Should Be Treated Differently From Overt Economic Measures and Should Be Accorded a Presumption of Validity.

Congress has chosen state and local governments to combat the nonhazardous solid waste management problem in this country through solid waste management planning.³

³ In the Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976), 42 U.S.C. §§ 6901-6987. ("RCRA"), Congress expressly disclaimed any major federal regulatory role in nonhazardous solid waste management, and affirmatively and expressly encouraged state and regional planning to solve the difficult issues surrounding waste disposal.

Federal lawmakers recognized the problems that communities faced in dealing with solid waste management, including "inter-governmental" relationships:

[T]he continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas[.]

42 U.S.C. § 6901(a)(3). Congress also found that, the collection and disposal of solid waste should continue to be primarily the function of state, regional, and local agencies, with the direct federal role limited to facilitating local planning through technical assistance. 42 U.S.C. § 6901(a)(4).

In Subtitle D of RCRA, 42 U.S.C. §§ 6941-49, Congress specifically encouraged states and regions within states to develop comprehensive waste management plans, "which are environmentally sound and which maximize the utilization of valuable resources including . . . materials which are recoverable from solid waste." 42 U.S.C. § 6941. Before receiving approval of a plan from the Environmental Protection Agency ("EPA") (which leads to fed-

Flow control is a mechanism to implement environmentally sound municipal solid waste management goals, not to make money. Such ordinances are an integral part of the state and local plans to ensure safe and efficient management of municipal solid waste.

Proper analysis addresses the extent to which the Town law is designed to protect the local environment, health and safety—areas that have long been recognized by this Court and Congress as within the purview of states.

Unlike overt economic measures intended to benefit in-state businesses, local regulation of solid waste management is based on concerns for the protection of public health and the environment. The state, as sovereign, has a legitimate and historically recognized power to protect both. The Court has long recognized and accorded deference to the reserved sovereign powers of the states to protect, defend and conserve the physical environment of the state itself. *See, e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1906).

The interest of the state as sovereign to protect its environment is no less important today. This Court has recognized the "substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems." *Minnesota v.*

eral financial assistance) state waste management plans must meet several criteria set forth in 42 U.S.C. § 6943. These criteria include "closing or upgrading" all open dumps in the state, *id.* at (a)(3), and require that localities be able to guarantee long term streams of waste to resource recovery facilities. *Id.* at (a)(5).

RCRA's legislative history establishes that Congress wanted states and localities to assume responsibility for disposal of their own solid waste in an environmentally sound manner. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 9-11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6247-49 ("House Report"). House Report at 32-36, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6270-73. *See also* House Report at 7, 88-93, 102-103, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6244-45, 6323-29, 6337-39.

Clover Leaf Creamery Co., 449 U.S. 471, 473 (1981); *Maine v. Taylor*, 477 U.S. 131 (1986). See also *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982) (The preservation and conservation of groundwater is "unquestionably legitimate and highly important"); *Breard v. Alexandria*, 341 U.S. 622, 640 (1951) ("When there is a reasonable basis for legislation to protect the social, as distinguished from economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana.") This plenary power was not withdrawn by the Commerce Clause, but only circumscribed by considerations of our federal economic system. As this Court stated in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960):

In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when, "confering upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

362 U.S. at 443-444.

Commerce Clause analysis of an exercise of local police powers should start from the recognition that a state has both an obligation and a right to act to protect its environment and its citizens. The Court has previously held that the states' exercise of police power in areas such as transportation safety, quarantines, and rivers and harbors are to be accorded great deference.⁴ This deference

⁴ "The regulation of highways is 'akin to quarantine measures, game laws, and similar local regulations of rivers, harbors, piers, and docks, with respect to which the State has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with

should be extended to state and local action in the area of municipal solid waste management based upon the important state interests involved, historically local duties and concerns, and (in this case) the continued acknowledgment by Congress in RCRA that state and local government action is the appropriate method for addressing the problems.

Dissenting in *Philadelphia v. New Jersey*, Chief Justice Rehnquist recognized that laws regulating the flow of solid waste should be viewed the same way as other health and safety measures:

Even if the Court is correct in its characterization of New Jersey's concerns, I do not see why a state may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the state without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety. The Commerce Clause was not drawn with a view to having the validity of state laws turn on such pointless distinctions.

437 U.S. at 632-33.

Thus, a state law that truly addresses environmental, not economic concerns, should be judged against a more lenient standard.

The pervasive and historic state regulation of solid waste should be treated differently from economic measures and should be accorded a presumption of validity. Deferential review of public health legislation is common in other areas of constitutional analysis unless expressly protected personal or political liberties are at stake. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

interstate commerce.'" *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 783 (1945).

The Court has traditionally manifested the presumption of validity through what it has termed "sensitive consideration" of the state's interest in comparison to the effects on commerce. "The purpose of the 'sensitive consideration' is to determine if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce." *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 692 (1981) (Rehnquist, C.J., dissenting). If the sensitive consideration shows no pretext, the presumption will be overcome only when the benefits are "slight or problematical." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959).

A presumption of validity appropriately focuses the analysis on the important state or local interest and places the burden on the person challenging the action to show not only that interstate commerce is affected, but that it is needlessly obstructed. The Court expounded the correct standard for the review of a non-economic, police power action in *Maine v. Taylor*:

As long as a State does not *needlessly* obstruct interstate trade to attempt to 'place itself in a position of *economic* isolation' it retains broad authority to protect the health and safety of its citizens and the integrity of its natural resources.

477 U.S. 131, 151, citing *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935) (emphasis added).

The presumption of validity should be even greater if there is an historic state interest involved. "[I]t also is true that the Court has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized.'" *Raymond*, 434 U.S. at 443, citing *Pike*, 397 U.S. at 143. The present case falls squarely within an area where the propriety of local police power

regulation has long been recognized.⁵ As such, local efforts to control solid waste should be presumed valid and accorded great deference. Further, this deference should be more pronounced where Congress, having considered the matter of municipal solid waste management, has purposely left it to the states and local authorities. As discussed above, RCRA evinces a federal policy of state action and control in the area of solid waste regulation.

An analysis of the local nature of a police power action and Congress's acquiescence in state action has been a factor in analyses of state action under Constitutional provisions. For example, *Huron Portland Cement* presented both a Supremacy Clause and Commerce Clause challenge to the city of Detroit's air quality requirements as they affected ships docked at Detroit harbor. In upholding Detroit's regulation of ship boiler firing, the Court found that Congress had not preempted the field of air quality protection and, indeed, had left air quality protection in large measure to the states. "Congressional recognition that the problem of air pollution is peculiarly a matter of state and local concern is manifest in this legislation." *Huron Portland Cement*, 362 U.S. at 446. *Accord Parker v. Brown*, 317 U.S. 341, 362, 363 (1943).

This same consideration of Congress's determination to leave to state regulation areas that are historically of local interest should be included in a Commerce Clause analysis of the present case.⁶ Such an approach recog-

⁵ See *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905) (Both cases upholding exclusive municipal franchises of solid waste disposal.)

⁶ (Chief) Justice Rehnquist urged just such an approach in a dissent in *Hughes v. Oklahoma*, stating "given the primacy of the local interest here, in the absence of conflicting federal regulation I would require one challenging a state conservation law on Commerce Clause grounds to establish a far greater burden on interstate commerce than is shown in this case." 441 U.S. 343 fn. 7.

nizes that states do not act in a vacuum, but must take into account both federal action and inaction. In a matter of important state interest such as municipal solid waste regulation, this Court must give effect to Congress's decision in RCRA to not preempt, but rather to urge, comprehensive state solid waste planning of the kind undertaken by New York State and implemented by the Respondent. The articulated federal policy to foster state and local action regulating municipal solid waste management should be accorded great deference.

CONCLUSION

For these reasons, the Court should affirm the decision of the New York Supreme Court, Appellate Division, Second Department.

Respectfully submitted,

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